Wong Sai Tack v Chien Hon Keong

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–22–643 OF 1996
ABDUL MALIK ISHAK J
30 OCTOBER 1999

Civil Procedure — *Res judicata — Senior assistant registrar dismissed first action as right defendant was not cited — Sole issue was not determined yet — Whether res judicata can be pleaded*

The defendant applied to strike out the plaintiff's action. Counsel for the defendant argued that the subject matter of the action was res judicata as it was related to a previous action filed before another branch of the High Court in Kuala Lumpur vide Civil Suit No S1–22–141–1996 ('the first action') which was struck out summarily by the senior assistant registrar ('the SAR'). Counsel for the defendant submitted that the same issues was finally determined by the SAR when the latter struck off the first action.

Held, dismissing the application:

The issue in the first action and this present action was whether the properties in both the suits were held on trust for the Association of Chha Yong Fay Kuan Selangor and Wilayah Persekutuan or for the descendants of the estate of Wong Chi Siu @ Ong Chee Siew. The SAR ruled that the public officer of the Association of Chha Yon Fay Kuan Selangor should be the right defendant and should be sued and for that reason the SAR struck out the first action. Thus the present action was filed citing the right defendant (see pp 77I–78B). The sole issue has not been adjudicated by the SAR. There was no finality, no conclusiveness, no final determination with precision of the issue in the first action. The doctrine of res judicata can never be applied by the defendant in this action (see p 83F–G).

[Bahasa Malaysia summary

Defendan telah memohon untuk membatalkan tindakan plaintif. Peguam defendan telah menghujahkan bahawa perkara pokok di dalam tindakan tersebut adalah res judicata kerana ia berkaitan dengan satu tindakan terdahulu yang telah difailkan di hadapan cabang lain Mahkamah Tinggi di Kuala Lumpur melalui Guaman Sivil No S1–22–141–1996 ('tindakan pertama') yang telah dibatalkan secara terus oleh penolong pendaftar kanan ('SAR tersebut'). Peguam defendan telah menghujahkan bahawa isu-isu yang sama akhirnya telah ditentukan oleh SAR tersebut apabila beliau membatalkan tindakan pertama tersebut.

Diputuskan, menolak permohonan tersebut:

Isu di dalam tindakan pertama tersebut dan tindakan sekarang ini adalah sama ada harta-harta di dalam kedua-dua tindakan guaman tersebut dipegang atas amanah untuk Persatuan Chha Yong Fay

A Kuan Selangor dan Wilayah Persekutuan atau untuk waris-waris harta pusaka Wong Chi Siu @ Ong Chee Siew. SAR tersebut telah memberi perintah bahawa pegawai awam bagi Persatuan Chha Yong Fay Kuan Selangor patut dijadikan defendan yang sebetulnya dan patut disaman dan oleh sebab itulah SAR tersebut telah membatalkan tindakan pertama tersebut. Oleh itu, tindakan ini telah difailkan dengan B menyaman defendan yang betul (lihat ms77I–78B). Satu-satunya isu itu telah tidak dibuat keputusan oleh SAR tersebut. Terdapat ketiadaan kemuktamadan, ketiadaan pertikaian yang kukuh, ketiadaan penentuan muktamad yang tepat tentang isu di dalam tindakan pertama tersebut. Doktrin res judicata tidak mungkin boleh C digunakan oleh defendan di dalam tindakan ini (lihat ms 83F–G).]

Notes

For cases on res judicata, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3959–4032.

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Cases referred to

A-G v Rochester Corpn (1833) 6 Sim 273 (refd)
A-G for Trinidad and Tobago v Eriche [1893] AC 518 (refd)
Andavan v Thong Nyik Lin [1966] 1 MLJ 57 (refd)
Arah Cipta Sdn Bhd & Anor v Kian Kee Sawmills (M) Sdn Bhd & Ors E [1997] 2 MLJ 11 (refd)
Badar Bee v Habib Merican Noording [1909] AC 615 (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (refd)
Behrens v Sieveking (1837) 2 My & Cr 602 (refd)
F *Bradshaw v McMullan* (1920) 2 IR 412 (refd)
Bullen, The case of Re (No 2) (1972) 29 DLR (refd)
Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2) [1966] 2 All ER 536 (refd)
Dr Leela Ratos & Ors v Anthony Ratos s/o Domingos Ratos & Ors [1996] 3 MLJ 167 (refd)
G *Eastwood and Holt v Studer* [1926] 31 Com Cas 251 (refd)
Fidelitas Shipping Co Ltd v v/o Exportchleb [1966] 1 QB 630 (refd)
Florence Bailes v Dr Ng Jit Leong [1983] 2 MLJ 175 (refd)
Francis, Times & Co v Carr [1900] 82 LT 698 (refd)
Glasgow and South-Western Railway Co v Boyd and Forrest [1918] SC 14 (refd)
H *Green v Weatherill* [1929] 2 Ch 213 (refd)
Hilton, ex parte March, Re (1892) 67 LT 594 (refd)
Hoystead v Taxation Comr [1926] AC 155 (refd)
Hubbuck v Wilkinson [1899] 1 QB 86 (refd)
IRC v Sneath [1932] 2 KB 362 (refd)
I *Irish Land Commission v Ryan* [1900] 2 IR 565 (refd)
Jamir Hassan v Kang Min [1992] 2 MLJ 46 (refd)
Kemsley v Foot [1951] 2 KB 34, [1951] 1 All ER 331, [1952] AC 345 (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd) A
Lee Sem Yoong v Leong Yoong [1967] 2 MLJ 86 (refd)
Livesey v Harding (1855) 21 Beav 227 (refd)
Lockyer v Ferryman (1877) 2 App Cas 519 (refd)
MacDougall v Knight (1890) 25 QBD 1 (refd)
Marginson v Blackburn Borough Council [1939] 2 KB 426 (refd) B
May, Re (1885) 28 Ch D 516 (refd)
Mayor, etc, of the City of London v Horner [1914] 111 LT512 (refd)
Morrison, Rose and Partners v Hillman [1961] 2 QB 266 (refd)
Moss v Anglo-Egyptian Navigation Co (1865) 1 Ch App 108 (refd)
Oh Thevesa v Sia Hok Chai [1992] 1 MLJ 215 (refd) C
Randolph v Tuck [1962] 1 QB 175, [1961] 1 All ER 814 (refd)
Saripah bte Manap & Ors v Emar Sdn Bhd (In dissolution) & Ors [1998] 1 MLJ 323 (refd)
Siang Yam Beng v Marushin Canneries (M) Sdn Bhd [1995] 4 MLJ 691 (refd)
Sterling Engineering Co Ltd v Patchett [1955] AC 534, [1955] 1 All ER 369 (refd) D
Surfleets Estate, Rawlings, Re v Smith [1911] 105 LT 582 (refd)
Tan Keat Seng, Kitson v Kerajaan Malaysia [1996] 1 MLJ 454 (refd)
Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 (refd)
Tengku Jaafar bin Tengku Ahmad v Karpal Singh [1993] 3 MLJ 156 (refd) E
Thoday v Thoday [1964] P 181 (refd)
Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24 (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)
Trinidad and Tobago v Eriche [1893] AC 518 (refd) F
Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661 (refd)
Waring, Re; Westminster Bank v Burton-Butler [1948] Ch 221, [1948] 1 All ER 257 (refd)
Webster v Armstrong (1885) 54 LJ QB 236 (refd)
Wenlock v Moloney [1965] 1 WLR 1238, [1965] 1 All ER 871 (refd) G
Worman v Worman (1889) 43 Ch D 296 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1) (a), (b), (c), (d), O 33 r 2 H

Tun Salleh Abas (*Lee Choon Her* with him) (*Lee & Yong*) for the plaintiff.
Chin Yew Meng (*Vilasini Chandrasekaran* with him) (*Allen & Gledhill*) for the defendant.

Abdul Malik Ishak J: This was an application by way of a summons in chambers filed by the defendant in encl 8 for the plaintiffs action to be I struck out on the grounds that the action filed by the plaintiff constituted an abuse of the process of the court and particularly that the subject matter of

A the action was said to be res judicata. Enclosure 8 was supported by an affidavit of Chiew Hon Keong that was affirmed on 14 July 1998 and which was filed on 17 July 1998 as seen in encl 7. There was no affidavit in reply to encl 7 and this was agreed by both parties. Tun Salleh Abas, learned senior counsel for the plaintiff, rightly pointed out that there was no necessity to file an affidavit in reply to that of encl 7 as the whole matter
B revolved on a question of law.

Mr Chin Yew Meng, learned senior counsel for the defendant, argued that the application to strike out in encl 8 was made because it was related to a previous action filed before another branch of the High Court in Kuala Lumpur vide civil suit No S1–22–141–1996 ('the first action') which was
C struck out summarily by the senior assistant registrar ('SAR') on the ground that it was an abuse of the process of the court. The parties to the first action as can be seen in exh CHK 1 of encl 7 were:

Civil Suit No S1–22–141–1996

Between

D (1) Wong Sai Tack @ Ong Tee Dake

(2) Chan Tiam Beng ... Plaintiffs

and

(1) Chong Shih Guan

E (2) Ngeow Sze Chan

(3) Chow Kim Lin

(4) Persatuan Chha Yong Fay Kuan Selangor Dan Wilayah Persekutuan ... Defendants

F whereas in the present action, there are only one plaintiff and one defendant. The sole defendant in the present action is the public officer of the association known as the association of Chha Yong Fay Kuan Selangor and Wilayah Persekutuan. In the first action, there were two plaintiffs and four defendants. Of pertinence, would be the absence of the public officer
G of the association being cited as a party in the first action.

Tun Salleh Abas, with vigour and vitality, summarized the law on res judicata in this way. It was his submission that there must be three pre-requisites before the doctrine of res judicata can come into play:

(1) there must be identity of parties;

H (2) the issue must be the same; and

(3) the same issue was already finally determined with precision.

Obviously the parties to the first action and that of the present action are different because in the first action there was a second plaintiff while the sole plaintiff in the present action was the first plaintiff in the first action. Yet,
I ironically, both sides agreed that the identity of the parties are the same. The issue in the first action with that of the present action are at par with one another and the issue may be stated as follows:

Whether the properties in both the suits were held on trust for the Association of Chha Yong Fay Kuan Selangor Wilayah Persekutuan or for the descendants of the estate of Wong Chi Siu @ Ong Chee Siew.

In summarily striking out the first action, the SAR ruled that the public officer of the Association of Chha Yon Fay Kuan Selangor should be the right defendant and should be sued and for that reason the SAR struck out the first action. It was for this very reason that the present action was filed citing the right defendant. In short, the SAR struck off the first action without finally determining the issue with precision.

I have been supplied with the grounds of decision of the SAR when he decided to strike out the first action summarily. The SAR certainly erred when he went beyond the terms of the summons in chambers as reflected in exh CHK 3 of encl 7. That summons in chambers for striking out the first action was under O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ('RHC'), namely, under category of being scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court. Now, if the wrong party was sued in the first action as held by the SAR then it can be regarded as an abuse of the process of the court but it surely cannot amount to showing a reasonable cause of action as envisaged under O18 r 19 (1)(a) of the RHC. By going into the merits of the first action the SAR was treading on dangerous grounds. How could the SAR decide the case on its merits when the right parties were not before him? It goes against the grain of common sense. It is foolhardy on the part of the SAR to do so. Striking out under the RHC are meant for plain and obvious cases. The present case cannot be said to be plain and obvious. Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86 at p 91 laid down a rule of law that remains vintage throughout the year and can still be regarded as good law. There his Lordship aptly said that it is only in plain and obvious cases that recourse should be had to the summary process of striking out. This same principle of law was adopted in the *Mayor, etc, of the City of London v Horner* [1914] 111 LT512 CA; and *Kemsley v Foot* [1951] 2 KB 34, [1951] 1 All ER 331 (CA) which was later affirmed by the House of Lords vide [1952] AC 345. Nor can this summary process be exercised by a minute and protracted examination of the documents and the facts of the case in order to see and ascertain whether the plaintiff really has a cause of action (*Wenlock v Moloney* [1965] 1 WLR 1238, [1965] 1 All ER 871 (CA)). I venture to add that if there is a point of law which requires adjudication, like the present case, then the matter should be set down for hearing a long drawn process of calling witnesses to the stand. Put it differently, having read the grounds of decision of the SAR, I can easily say and conclude that the pleadings disclosed some cause of action which should be set down for argument as required under O 33 r 2 of the RHC : *Saripah bte Manap & Ors v Emar Sdn Bhd (In dissolution) & Ors* [1998] 1 MLJ 323. I might as well add that any application to strike out, expunge or amend any passage or paragraph in the pleadings must be itemised and set out in a clear and unambiguous manner, namely, setting out whether it is to strike out, expunge or amend and it must clearly identify the exact words, passages or lines in the pleadings that

needed to be struck out, expunged or amended. Vagueness and ambiguity will result in it being struck out for uncertainty and lack of precision (*Dr Leela Ratos & Ors v Anthony Ratos s/o Domingos Ratos & Ors* [1996] 3 MLJ 167). Even though the rule states that the order to strike out can be made at any stage of the proceedings, there must, nevertheless, be promptitude in applying (*Jamir Hassan v Kang Min* [1992] 2 MLJ 46). Of course the court has a discretion to allow the application to strike out even after the close of the pleadings, but it rarely happens and the court will almost always refuse to exercise such a discretion where the matter has been set down for trial : *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83 and *Siang Yam Beng v Marushin Canneries (M) Sdn Bhd* [1995] 4 MLJ 691. It is a drastic measure and a draconian method to strike out an action summarily (*Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1; and *Tengku Jaafar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156) and the court must be wary about it and will only strike out where the claim is obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 (SC); *Arah Cipta Sdn Bhd & Anor v Kian Kee Sawmills (M) Sdn Bhd & Ors* [1997] 2 MLJ 11 (CA); *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC); and *Tan Keat Seng, Kitson v Kerajaan Malaysia* [1996] 1 MLJ 454). To determine what is plain and obvious would entirely be objective in its approach and it requires that kind of perception which Judges are known to have. Sometimes a long and elaborate hearing is required before the Judge is satisfied that there is no cause of action (*Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 at p 679) . To reiterate, the present case contains a point of law and it is unjust and it would occasion a failure of justice to simply strike it down (*Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215).

I do not propose to examine the merits of the whole case. Enclosure 8 revolved entirely on the doctrine of res judicata and it was the submission of Mr Chin Yew Meng that the same issue was finally determined by the SAR when the latter struck off the first action. Was he correct? Certainly not.

Brett MR in *Re May* (1885) 28 ChD 516 at p 518 (CA) aptly said:

> ... it is one of the most fundamental doctrines of all courts, that there must be an end to all litigation.

The doctrine of res judicata is based on public convenience. Lord Blackburn in *Lockyer v Ferryman* (1877) 2 App Cas 519 (HL) had this to say at p 530 of the report :

> The object of the rule of res judicata is always put upon two grounds the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the individual that he should be vexed twice for the same cause.

And this very dictum was approved by Holroyd Pearch LJ in *Morrison, Rose and Partners v Hillman* [1961] 2 QB 266 at p 276. Lord Reid too approved of this dictum in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1966]

2 All ER 536 at p 549 (HL). Maugham J in *Green v Weatherill* [1929] 2 Ch 213 at p 221 said: A

> The plea of res judicata is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation.

Holmes LJ in *Irish Land Commission v Ryan* [1900] 2 IR 565 at p 584 said: B

> ... it would be contrary to public policy to allow the same parties to re-agitate the same matter in subsequent proceedings. Estoppel by matter of record rests on this principle, and though it may be said in one sense to exclude the truth, it is essentially just and righteous.

The philosophical background of the doctrine of res judicata was appropriately put by Diplock LJ in *Thoday v Thoday* [1964] P 181 (CA) at p 197 in these fine words: C

> Estoppel merely means that, under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances, to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant D in an action. If the court is required to exercise an inquisitorial function and may inquire into facts which the parties do not choose to prove, or would under the rules of the adversary system be prevented from proving, this is a function to which the common law concept of estoppel is alien. It may well be a rational rule to apply in the exercise of such an inquisitorial function to say that if a court having jurisdiction to do so has once inquired into the truth of E a particular allegation of fact and reached a decision thereon, another court of co-ordinate jurisdiction in the exercise of its own discretion should not re-embark upon the same inquiry, but should accept the decision of the first court. But this is a different concept from estoppel as hitherto known in English law. It will be interesting to watch its development in future cases, but fortunately it is not, in my view, necessary to develop it in the present appeal. F For, whatever this new concept may involve, it would appear from those cases in which it has been adumbrated that it only becomes relevant in cases where, under the old common law concept of estoppel, a party to matrimonial proceedings would be prevented from proving facts or matters which the court, in the exercise of its inquisitorial functions, might regard as relevant to its decision in those proceedings.

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Slesser LJ in *Marginson v Blackburn Borough Council* [1939] 2 KB 426 at p 438 (CA) aptly said:

> This seems to us a clear decision on the same issue between the same persons litigating in the present case, and establishes conclusively, albeit in the county court, in a claim by the defendants against the present plaintiff that both were H equally to blame. We think, therefore on this head, that the appeal succeeds and that the plaintiff is estopped from bringing his first cause of action.

A res judicata is nothing more than a judicial decision, pronounced by a judicial tribunal having competent jurisdiction to adjudicate and arrive at a final judicial decision. Thus, judgments, orders, decrees, sentences, declarations, etc, of judicial tribunals have been held and considered to be I res judicata — meaning conclusive and unimpeachable on the merits. The case of *Francis, Times & Co v Carr* [1900] 82 LT 698 (CA) is an example

of a decision which did not amount to res judicata. In that case, the defendant set up, by way of estoppel, the report of a commission appointed by the Sultan of Muscat. That report was meant to inquire into the circumstances surrounding the seizure by the defendant when the defendant was in command of one of Her Majestys gunboats. The report of the commission was submitted to and subsequently adopted by the Sultan in toto. In that report, the commission reported that the seizure was lawful. Vaughan Williams LJ delivering the judgment of the court held that the inquiry and the report were made for the information and guidance of the Sultan and, consequently, the report by the commission was not a judicial decision.

To augment the defence of res judicata, it would be necessary to show that the subject matter in dispute was the same (*Hoystead v Taxation Comr* [1926] AC 155 (PC); *Moss v Anglo-Egyptian Navigation Co* (1865) 1 Ch App 108; *Re Hilton; ex p March* (1892) 67 LT 594; *Worman v Worman* (1889) 43 Ch D 296 at p 306; *Re Surfleets Estate, Rawlings v Smith* [1911] 105 LT 582; *Bradshaw v McMullan* (1920) 2 IR 412 at p 423 (HL); and *Re Waring, Westminster Bank v Burton-Butler* (1948) Ch 221, (1948) 1 All ER 257). Next, it would also be necessary to show that the matter came before a court of competent jurisdiction (*A-G for Trinidad and Tobago v Eriche* [1893] AC 518 at p 522, 523 PC; *Eastwood and Holt v Studer* (1926) 31 Com Cas 251; *IRC v Sneath* [1932] 2 KB 362 at p 380, 388 (CA)) . It is germane to mention that a judgment of a court which has no jurisdiction to pronounce it, is said to be void and cannot, in law, give rise to an estoppel. Finally, it would be necessary to show that the judicial tribunal came to a conclusive decision binding on every other court (*Behrens v Sieveking* (1837) 2 My & Cr 602 at p 603; *Eastwood and Holt v Studer* (1926) 31 Com Cas 251; and *Bradshaw v McMullan* (1920) 2 IR 412 at pp 423, 424 (HL)). In my judgment, the doctrine of res judicata is not a technical doctrine. It is a simple doctrine which ensures that there must be an end to litigation (*Webster v Armstrong* (1885) 54 LJ QB 236; *MacDougall v Knight* (1890) 25 QBD 1 (CA); and *Green v Weatherill* [1929] 2 Ch 213). Here, the defendant raised the doctrine of res judicata by way of an estoppel to the present action. The defendant was in fact saying that the whole legal rights and obligations of the parties have been concluded in the first action by the SAR. I am entitled to look at the decision of the SAR as well as to the notes of evidence (exh CHK 7 of encl 7) to arrive at a just decision as to whether the doctrine of res judicata can be invoked in favour of the defendant (*Randolph v Tuck* [1962] 1 QB 175, [1961] 1 All ER 814; *Marginson v Blackburn Borough Council*; and *Sterling Engineering Co Ltd v Patchett* [1955] AC 534, [1955] 1 All ER 369). *The case of Re Bullen (No 2)* (1972) 29 DLR ((3d) 257 (BC) allows this court to have regard to the reasons for the judgment of the SAR in order to determine the question of law decided in the first action and having done so, it was my judgment that the decision of the SAR in the first action was not conclusive and was not binding in regard to the present action. In short, the cause of action had not been determined on the merits (*Badar Bee v Habib Merican Noording* [1909] AC 615 (PC); *Livesey v Harding* (1855) 21 Beav 227; *A-G v Rochester Corp* (1833) 6 Sim

273; and *Glasgow and South-Western Railway Co v Boyd and Forrest* [1918] SC 14). A

In the local scene, Chang Min Tat FJ had this to say of the doctrine in the case of *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24:

> At the hearing of the appeal, it was put to counsel for the appellants that to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; [1964] MLJ 49 'necessarily and with precision determine the point in issue, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect, see how he could succeed. B C

Ajaib Singh J in *Florence Bailes v Dr Ng Jit Leong* [1983] 2 MLJ 175 said at p 176 of the report:

> I think it may not be an unreasonable inference to draw from all the facts and circumstances leading to the interim injunction and subsequently to the order vacating the interim injunction that the parties had confined themselves to the issue only of the interim injunction and not to the suit as a whole. Thus the hearing and arguments during the interim injunction stage were not exhaustive for the determination of the issues involved in the suit. In view of all these matters it seems to me that the plea of res judicata should not prevail and that in the interest of justice there should be a full hearing of the suit itself. For this reason too I hold that the presiding judge who would now hear this suit is not functus officio and therefore not precluded from hearing the case. D E

Ismail Khan J in *Andavan v Thong Nyik Lin* [1966] 1 MLJ 57 summarized the doctrine in these words:

> To invoke the doctrine of res judicata the respondent has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the court which heard it. F

Gill J in *Lee Sem Yoong v Leong Yoong* [1967] 2 MLJ 86 at p 88 remarked of the doctrine in these words:

> The next point which I had to consider was the defence of res judicata set up by the defendant. For the doctrine of res judicata to apply, a defendant has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the court which heard it. To see what was decided in the previous case it is necessary to look at the judgment itself (per Ismail Khan J in *Andavan v Thong Nyik Lin* [1966] 1 MLJ 57. G H

Lord Guest in *Carl-Zeiss Stiftung v Rayner and Keeler, Ltd (No 2)* [1966] 2 All ER 536 at p 564 succinctly said of the doctrine in these fine words:

> The doctrine of estoppel per rem judicatam is reflected in two Latin maxims, (i) *interest rei publicae ut sit finis litium;* and (ii) *nemo debet bis vexare pro una et eadem causa.* The former is public policy and the latter is private justice. The rule of estoppel by res judicata, which is a rule of evidence, is that where a final I

A decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits (*Spencer Bower on Res Judicata, p 3*).

B As originally categorized, res judicata was known as 'estoppel by record. But as it is now quite immaterial whether the judicial decision is pronounced by a tribunal which is required to keep a written record of its decisions, this nomenclature has disappeared and it may be convenient to describe res judicata in its true and original form as 'cause of action estoppel'. This has long been recognized as operating as a complete bar if the necessary C conditions are present. Within recent years the principle has developed so as to extend to what is now described as 'issue estoppel', that is to say where in a judicial decision between the same parties some issue which was in controversy between the parties and was incidental to the main decision has been decided, then that may create an estoppel per rem judicatam

D Lord Denning too in *Fidelitas Shipping Co Ltd v v/o Exportchleb* [1966] 1 QB 630 had this to say of the doctrine of res judicata and issue estoppel at p 640 of the report:

The law, as I understand it is this : if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law E that he cannot bring another action against the same party for the same cause. Transit in rem judicatam: see *King v Hoare* (1844) 13 M & W 494 at p 504; 153 ER 206. But within one cause of action there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and *distinctly determined between the parties*, then, as a general rule, neither party can be allowed to fight that issue all over F again.

At the end of the day, it was up to me to decide whether the doctrine of res judicata can be called to the aid of the defendant. The sole issue has not been adjudicated by the SAR. There was no finality, no conclusiveness, no G final determination with precision of the issue in the first action. That being the case, the doctrine of res judicata can never be applied by the defendant in the context of the present action. For these varied reasons, encl 8 should be dismissed with costs.

Application for striking out dismissed.

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Reported by Benjamin Yong

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